Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

CITY OF ROSEBURG,

Petitioner,

vs.

MARLYN L. ROHDE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in requiring proof of probable cause, instead of reasonable suspicion, to constitutionally support a brief, temporary, and otherwise valid investigative detention under *Terry v. Ohio* because one of the detaining officers announced an arrest of the detainee?

2. Did the Ninth Circuit err in concluding that there was no probable cause to arrest the respondent, the mother and passenger of the driver for whom the Ninth Circuit found probable cause to arrest for possessing a stolen car?

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Mark E. Rohde was a plaintiff in the District Court and an appellant before the Ninth Circuit Court of Appeals. Tommy A. Sorenson, dba Oregon Auto Exchange, was a plaintiff in the District Court. Neither are parties to this petition.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Jurisdiction	1
Constitutional Provisions and Statutes Involved	2
Statement of the Case	2
1. Basis of Jurisdiction in the Lower Courts.	2
2. Summary of Material Facts.	3
3. Procedural History.	5
Reasons for Granting the Writ	6
I The Ninth Circuit's Opinion Departed From Controlling Fourth Amendment Decisions of This Court in Holding that the Reasonableness of Respondent's Detention Depended Solely on Officer McFadden's Subjective Intent to Arrest Rather Than on an Objective Evaluation of All the Facts and Circumstances Then Apparent to the Officers During This Five to Six Minute, On-Scene Investigation and Release of Respondent.	6, 7

Contents

Page

II The Ninth Circuit's Opinion Conflicts with the Rulings of Other Circuit Courts of Appeal and of State Supreme Courts Which Have Held that the Reasonableness of a Proper Detention Under the Fourth Amendment is Unaffected by the Officer's Subjective Intent to Arrest. 10

III Officer McFadden Had Grounds To Reasonably Suspect That The Driver And The Respondent May Have Committed Felonies Involving A Stolen Car, And Respondent's Detention Lasted Only Long Enough For Officer McFadden To Conduct A Diligent Investigation Which Was Reasonably Related In Scope To His Suspicions. 14

IV The Ninth Circuit Erred in Holding that There was No Probable Cause to Arrest Respondent. 17

Conclusion 19

TABLE OF CITATIONS

Cases Cited:

Burkes v. State, 830 S.W. 2d 922 (Tex. Crim. App. 1991) 13

City of Los Angeles v. Heller, 475 U.S. 796, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986) 13, 19

Contents

	Page
Downs v. State, 570 A.2d 1142 (Del. 1990)	11, 12
Draper v. United States, 358 U.S. 307. 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959)	18
Harris v. United States, 382 A.2d 1016 (D.C. App., 1978)	16
Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961)	2
Marlyn L. Rohde, et al. v. City of Roseburg, et al., 137 F.3d 1142 (9th Cir. 1998)	1
Maryland v. Wilson, __ U.S. __, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997)	14, 15, 16
Michigan v. Summers, 452 U.S. 692, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981)	16
Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)	1
Pennsylvania v. Mimms, 434 U.S. 106, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977)	14, 15
People v. Stevens, 183 Colo. 399, 517 P.2d 1336 (1973)	11, 12
Pfannstiel v. City of Marion, 918 F.2d 1178 (5th Cir. 1990)	19

Contents

Page

Scott v. Henrich, 39 F.3d 912 (9th Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 2612, 132 L. Ed. 2d 855 (1995) 13, 15, 19

Scott v. United States, 436 U.S. 128, 98 S. Ct. 1717, 56 L. Ed. 2d 168 (1978) 8, 9

State v. Lyons, 85 Wash. App. 268, 932 P.2d 188 (1997) 12

State v. Perera, 412 So. 2d 867 (Fla. App. 1982) 13

State v. Romeo, 43 N.J. 188, 203 A.2d 23 (New Jersey 1964), *cert. denied*, 379 U.S. 970, 85 S. Ct. 668, 13 L. Ed. 2d 563 (1965) 11, 12

State v. Sims, 639 S.W. 2d 105 (Mo. App. 1982) 12

State v. Walton, 159 N.J. Super. 408, 388 A.2d 268 (1978) 13

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) ..... *passim*

United States v. Bautista, 684 F.2d 1286 (9th Cir. 1982), *cert. den.* 459 U.S. 1211, 103 S. Ct. 1206, 75 L. Ed. 2d 447 (1983) 15, 16

United States v. Fernandez, 18 E.3d 874 (10th Cir. 1994) 14

United States v. Hensley, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985) 8, 9, 14

Contents

Page

United States v. Miller, 84 F.3d 1244 (C.A. 10 1996) 14

United States v. Muldrow, 19 F.3d 1332 (10th Cir. 1994) 11

United States v. Parr, 843 F.2d 1228 (9th Cir. 1988) . 14

United States v. Richards, 500 F.2d 1025 (9th Cir. 1974) 16

United States v. Robinson, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973) 8, 9, 16

United States v. Robinson, 536 F.2d 1298 (9th Cir. 1976) 14

United States v. Sharpe, 470 U.S. 675, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985) 16, 17

United States v. Vargas, 633 F.2d 891 (1st Cir. 1980) 11

United States v. Watts, 7 F.3d 122 (8th Cir. 1993) 16

Whren v. United States, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996) 8, 9

Statutes Cited:

28 U.S.C. § 1254(1) 1

Contents

	Page
28 U.S.C. § 1291	2
28 U.S.C. § 1331	2
28 U.S.C. § 1343(3)	2
28 U.S.C. § 2101(c)	1
42 U.S.C. § 1983	2, 5
ORS 164.135	5
ORS 819.300	5
United States Constitution Cited:	
Fourth Amendment	*passim*
Rules Cited:	
Supreme Court Rule 13	2
Supreme Court Rule 30	2

Contents

Page

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Ninth Circuit Filed March 4, 1998 ..... 1a

Appendix B — Order and Judgment of the United States District Court for the District of Oregon Filed July 8, 1994 ..... 10a

Appendix C — Excerpts of the Deposition of Tom McFadden Dated April 27, 1993 ..... 21a

PETITION FOR WRIT OF CERTIORARI

Petitioner, the City of Roseburg, an Oregon Municipal Corporation, respectfully prays that the Court issue a writ of certiorari to review the opinion and order of the United States Court of Appeals for the Ninth Circuit in the above-entitled case; to reverse that part of the Ninth Circuit's order which reversed the District Court's entry of summary judgment in favor of petitioner and against respondent/plaintiff Marlyn L. Rohde; and to remand the matter for the entry of a judgment in favor of petitioner and against respondent Marlyn L. Rohde.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in this matter is reported as *Marlyn L. Rohde, et al. v. City of Roseburg*, et al., 137 F.3d 1142 (9th Cir. 1998), and a copy of the slip opinion is set forth at Appendix A to this petition. In its opinion and order, the Court of Appeals for the Ninth Circuit affirmed in part (as to plaintiff Mark E. Rohde) and reversed in part (as to plaintiff Marlyn L. Rohde) the judgment of the United States District Court for the District of Oregon, which had granted petitioner's (then defendant's) motion for summary judgment on the grounds that the Roseburg Police Officers' vehicular stop and subsequent detention of plaintiffs was based on probable cause and so did not violate their Fourth Amendment rights. The unreported Order and Judgment of the District Court is set forth at Appendix B to this petition.

JURISDICTION

Jurisdiction to review the Court of Appeals' judgment and opinion by writ of certiorari in this civil case is conferred upon this Court by 28 U.S.C. § 1254(1) and the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817, 86 L.Ed.2d 411 (1985). The opinion of the United States Court of Appeals for the Ninth Circuit was filed on March 8, 1998, and the judgment sought to be reviewed was entered on the same date.

This petition for a writ of certiorari is being filed within the 90-day period prescribed by 28 U.S.C. § 2101(c) and

Rule 13 of the Court, as computed in accordance with Rule 30 of the Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the prohibition against unreasonable seizures found in the Fourth Amendment to the United States Constitution and made applicable to the states by the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). The Fourth Amendment to the United States Constitution provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Plaintiffs brought suit under 42 U.S.C. § 1983 which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

1. Basis of Jurisdiction in the Lower Courts.

The basis for federal jurisdiction in the United States District Court for the District of Oregon over plaintiffs' claims is 28 U.S.C. §§ 1331 and 1343(3). The basis for jurisdiction in the Court of Appeals for the Ninth Circuit is 28 U.S.C. §1291.

2. Summary of Material Facts.

The following facts were found to be undisputed by the District Court and were the basis for petitioner's summary judgment motion. The District Court's factual findings are not in issue.[1]

On September 1, 1990, City of Roseburg Police Officer Tom McFadden stopped Plaintiff Mark Rohde to issue him a speeding ticket. Mr. Rohde's mother, Plaintiff Marlyn Rohde, was in the passenger's seat of the car.

Officer McFadden obtained Mr. Rohde's driver's license, but Mr. Rohde did not have a vehicle registration and provided the vehicle's title instead to Officer McFadden. At that time, Officer McFadden noticed that the name on the title of the vehicle was different from Mr. Rohde's name. McFadden also noticed a machete and several "bowie" knives lying on the back seat of the car.[2] During the encounter, Officer McFadden was told by his dispatcher that the vehicle being driven by Mr. Rohde had been reported as stolen by the Medford Police Department. The dispatcher obtained this information from computerized records available on her computer screen.

After receiving the above information, Officer McFadden arrested Mr. Rohde, put handcuffs on his wrists, and placed him in the back seat of Officer McFadden's patrol car. Officer McFadden told Mr. Rohde that the vehicle was stolen and that Mr. Rohde was under arrest for possession of a stolen vehicle.

Officer McFadden, along with Officer Anthony Dimare, then approached Mrs. Rohde and had her step out of the car. Officer McFadden explained to Mrs. Rohde that he was

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[1] See "Facts" in the Order of Magistrate Judge John P. Cooney dated July 8, 1994, at pages 2-6 (App. B at pages 11a-14a).

[2] Magistrate Cooney's finding was that "he [Officer McFadden] observed several knives lying on the back seat of the car." (App. B at page 11a). However, Officer McFadden's deposition at page 20, which Magistrate Cooney cited, describes the knives as " . . . they were machetes, there was a machete, and several like bowie knives, and just a variety of different types of knives." (App. C at page 23a).

arresting her for being in possession of a stolen vehicle. Because of her age (55 years old), Officer McFadden placed handcuffs on her in front of her, instead of handcuffing her wrists behind her. Mrs. Rohde was then placed in Dimare's patrol car.

After Mr. Rohde was advised of his Miranda rights, he told Officer McFadden that he knew nothing about the car being stolen and that he had purchased the car from Oregon Auto Exchange of Medford, Oregon, on May 22, 1990. Mr. Rohde said there were some papers in the car that showed he had purchased the car. Officer McFadden then found a bill of sale in the glove compartment of the car which showed Mr. Rohde's name as the buyer and which was signed by Ron Market as the salesperson.

Officer McFadden then called for the on-duty watch commander, Sergeant Larner, who came to the scene and was briefed by Officer McFadden. They next asked their dispatcher to contact the Medford Police Department and explain that Mr. Rohde had a vehicle bill of sale with his name on it.

Sergeant Stedman of the City of Medford was then contacted. Sergeant Stedman confirmed the existence of a signed stolen report on the car; however, after the situation was explained to him, Stedman advised the officers that there must have been a mistake and that they should release Mr. and Mrs. Rohde and have them call him. Officer McFadden immediately removed the plaintiffs' handcuffs, explained what had happened, and told the plaintiffs they were free to go. The plaintiffs were held in the two patrol cars for only five to six minutes before they were released.

After the plaintiffs were released, Officer McFadden offered to escort them to the City of Roseburg Police Department so that they could call Sergeant Stedman. Accepting the offer, they were escorted to the Police Department where they called Sergeant Stedman. He told them that the dealer where they bought the car had reported the car stolen earlier, but had neglected to tell the Medford Police that it since had been found.

3. Procedural History.

On August 31, 1992, the plaintiffs, Marlyn L. Rohde and Mark E. Rohde, filed suit in United States District Court for the District of Oregon under 42 U.S.C. § 1983 to recover damages from the City of Roseburg.[3] In their complaint they allege that "officers of the City of Roseburg arrested them on suspicion of auto theft without probable cause, and seized them in a manner and for a duration of time that was unreasonable under the circumstances" in violation of the "plaintiffs' Fourth Amendment constitutional right to be secure in his [sic] person against unreasonable seizures."

On May 10, 1994, defendant/petitioner filed its motion for summary judgement on the grounds that the plaintiffs' stop and detention was reasonable and did not violate the Fourth Amendment under *Terry v. Ohio* (392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 [1968]), and that there was probable cause as a matter of law to arrest Mark Rohde for possession of a stolen car in violation of Oregon Revised Statutes (ORS) 819.300 and Marlyn Rohde for unauthorized use of a vehicle in violation of ORS 164.135.[4] Plaintiffs opposed the motion

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[3] A common law negligence count also was included against the automobile dealer, but that claim was separately settled and is not in issue in this petition or the Ninth Circuit appeal.

[4] ORS 819.300 provides as follows:

> "(1) A person commits the offense of possession of a stolen vehicle if the person possesses any vehicle which the person knows or has reason to believe has been stolen.
>
> (2) The offense described in this section, possession of a stolen vehicle, is a Class C felony."

ORS 164.135 provides in part as follows:

> "(1) A person commits the crime of unauthorized use of a vehicle when:
>
> (a) The person takes, operates, exercises control over, rides in or otherwise uses another's vehicle, . . . without consent of the owner; . . . .
>
> (2) Unauthorized use of a vehicle . . . is a Class C felony."

on grounds that there was no probable cause and filed a cross-motion for summary judgment.

On July 8, 1994, the District Court filed a written Order in which it granted defendant/petitioner's motion for summary judgment, and denied plaintiffs' cross-motion for summary judgment, based on its finding that there was probable cause to arrest the plaintiffs. (App. B, pages 10a-19a). The District Court agreed that the plaintiffs' presence in a car which had been reported stolen, together with Mr. Rohde's inability to produce a vehicle registration and the fact that the title which he did produce was not in his name, justified the plaintiffs' arrests, and so the Court never reached the *Terry* issues. Judgment for defendants was entered on the same date. (App. B at page 20a).

The plaintiffs appealed to the Ninth Circuit Court of Appeals, arguing only that there was no probable cause to arrest the plaintiffs. Petitioner again urged that the plaintiffs' detention did not deprive them of any Fourth Amendment rights both because there was probable cause to arrest and because their very short, temporary custody was a reasonable investigative detention under *Terry v. Ohio, supra*. Although the Ninth Circuit's majority opinion, filed March 8, 1998, conceded that the officers' actions arguably were otherwise within the scope of a *Terry* investigative stop, it summarily declined to view this as a *Terry* investigative detention only because the officers told the plaintiffs they were under arrest. (137 F.3d at 1144; App. A at page 5a). Accordingly, the panel concluded that the officer's actions could only be justified by evidence of probable cause, a conclusion which is assigned as error in this petition. After a *de novo* review of the evidence, the majority agreed there was probable cause to arrest Mark Rhode, and affirmed the District Court's judgment against him. However the panel disagreed there was probable cause as to Marlyn Rhode, which also is assigned herein as error, and reversed and remanded as to her. (App. A).

REASONS FOR GRANTING THE WRIT

I

The Ninth Circuit's Opinion Departed From Controlling Fourth Amendment Decisions of This

Court in Holding that the Reasonableness of Respondent's Detention Depended Solely on Officer McFadden's Subjective Intent to Arrest Rather Than on an Objective Evaluation of All the Facts and Circumstances Then Apparent to the Officers During This Five to Six Minute, On-Scene Investigation and Release of Respondent.

Both the District Court (App. B at pages 14a-15a) and the Ninth Circuit (137 F.3d at 1143; App. A at page 5a) found that the plaintiffs were held only five to six minutes at the most in the patrol cars while Officer McFadden investigated the matter further and determined from the Medford Police that there had been an apparent mistake and that the plaintiffs should be released and asked to call Sergeant Stedman in Medford to clarify the circumstances. They were released immediately afterward. Such a brief, investigative detention, where reasonably related to the circumstances that justified the intrusion in the first place, may be justified by less than probable cause, i.e. by evidence supporting a reasonable suspicion of criminal activity. *Terry v. Ohio, supra.* While the Ninth Circuit panel acknowledged that the stop otherwise was within the scope of a *Terry*-type detention, it summarily refused to regard respondent's detention under *Terry* only because Officer McFadden told her she was under arrest. The Ninth Circuit erred because it should not have decided whether the respondent's detention was reasonable based upon the officer's subjective claim of greater authority, i.e. to arrest, but rather based upon the brief, minimal and reasonable investigative detention which actually took place.

The Ninth Circuit's rigid reliance on the announced "arrest" departs from *Terry v. Ohio, supra,* itself, where this Court declined to decide whether detention by a police officer violated the Fourth Amendment based solely on semantic distinctions between an "arrest" and a "stop." 392 U.S. at 16-17. Recognizing that both involve intrusions and restrictions on a person's liberty interests, and that the Fourth Amendment protects not against all seizures, but rather unreasonable seizures, this Court said that the proper inquiry is the reasonableness under all of the circumstances of the particular governmental intrusion on a person's personal security. *Id.* at 9 and 18. Moreover, the test of such reasonableness requires

balancing the need for the search or seizure against the invasion it entails. *Id.* at 20-21.

The Ninth Circuit neither balanced nor considered the totality of the circumstances. Relying only on the announced arrest, it ignored the other facts and circumstances which showed that respondent actually experienced, only a brief, temporary detention[5] which did not depend upon the putative arrest for its validity. On the contrary, as demonstrated in Section III, below, it was independently supported by the officer's articulable grounds to reasonably suspect that the car was stolen, and as it was reasonably related in scope to that suspicion, and as it lasted only as long as was reasonable for the officer to quickly confirm or dispel that suspicion, the detention was reasonable under the Fourth Amendment and did not require "probable cause." *Terry v. Ohio, supra.*

The Ninth Circuit's opinion also departs from this Court's consistent teaching that the reasonableness of the officer's actions under the Fourth Amendment must be evaluated based on an objective view of all the facts and circumstances then known to the officer, and not on the officer's subjective intentions or opinions, even where those intentions or opinions may be unreasonable. *Whren v. United States*, 517 U.S. 806, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); *United States v. Hensley*, 469 U.S. 221, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985); *Scott v. United States*, 436 U.S. 128, 136-137, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978) (minimization of wire interceptions by law enforcement agents pursuant to a court order which was objectively reasonable under the circumstances then known to the agents, was not rendered unreasonable because the agents allegedly intended no minimization or because they failed to take steps to minimize); *United States v. Robinson,* 414 U.S. 218, 236, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) (officer's search incident to arrest

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[5] The appellate panel's very characterization of Officer McFadden's actions as an arrest requiring probable cause is at odds with *Terry*, where the Court pointed out that an arrest "is a wholly different kind of intrusion upon individual freedom than a limited search . . . It is the initial stage of a criminal prosecution. It . . . is *inevitably accompanied by future interference with the individual's freedom of movement.* [emphasis added]" 392 U.S. at 26. Nothing like that occurred here.

which was objectively reasonable did not violate the Fourth Amendment simply because the officer did not subjectively fear the suspect or subjectively believe that the suspect was armed at the time of the search); *Terry v. Ohio, supra* at 19-20.

This Court most recently considered this issue in *Whren v. United States, supra,* where it rejected the invitation to hold an otherwise justifiable traffic stop improper under the Fourth Amendment because the detaining officer's motivation in making the stop was not enforcement of traffic regulations. The Court noted:

> "Not only have we never held, outside the context of inventory search or administrative inspection (discussed above), that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary." (___ U.S. at ___, 116 S.Ct. at 1774).

After reviewing several of its previous decisions, including *United States v. Robinson, supra*, and *Scott v. United States, supra*, the Court concluded: "We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." *Id.*

This echoes similar pronouncements on the subject by this Court, such as this observation in *Scott v. United States, supra*:

> "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken so long as the circumstances, viewed objectively, justify that action." 436 U.S. 138.

United States v. Hensley, supra, is illustrative. Police officers stopped Hensley's car and detained him on the basis of a "wanted flyer" from another jurisdiction while they checked for any outstanding warrants. The flyer asked that the defendant be held for pick-up by the originating police agency, a detention which the Court assumed would exceed

the scope of that permitted by *Terry v. Ohio.* However, during the short time the detaining officers were checking for warrants, they properly discovered evidence giving them independent probable cause to arrest the defendant. This Court held that the actual investigative detention (to check for warrants before cause arose for the arrest) was a reasonable detention supported by reasonable suspicion (the "wanted flyer"), even though the police may have intended to hold the defendant for an unreasonable duration, pursuant to the request in the flyer, had the grounds for arrest not arisen. The Court observed:

> It is irrelevant whether the Covington officers intended to detain Hensley only long enough to confirm the existence of a warrant, or for some longer period; what matters is that the stop and detention that occurred were in fact no more intrusive than would have been permitted an experienced officer on an objective reading of the flyer. 469 U.S. at 234-235.

So in this case it does not matter that Officer McFadden announced or intended respondent's arrest. What matters is that the stop and detention that occurred were in fact no more intrusive than any reasonable officer would have considered lawful based on an objective evaluation of the grounds to suspect the car was stolen. In failing to apply this test, the Ninth Circuit departed from this Court's controlling authorities and so committed reversible error.

II

The Ninth Circuit's Opinion Conflicts with the Rulings of Other Circuit Courts of Appeal and of State Supreme Courts Which Have Held that the Reasonableness of a Proper Detention Under the Fourth Amendment is Unaffected by the Officer's Subjective Intent to Arrest.

The Ninth Circuit's opinion not only departs from this Court's controlling Fourth Amendment authorities, it also conflicts with at least two other Circuit Courts of Appeal and with several high State Courts.

In *United States v. Muldrow*, 19 F.3d 1332, 1336 (10th Cir. 1994), the United States Court of Appeal for the Tenth Circuit held that, despite the characterization in the officers' reports of the detention as an "arrest," the facts showed that the defendant was detained on reasonable suspicion for a valid investigative stop at the time he gave consent to search. In *United States v. Vargas*, 633 F.2d 891, 896 (1st Cir. 1980) the First Circuit upheld an officer's initial stop and detention of defendants' car upon reasonable suspicion of narcotics dealing despite defendants' contention that the officers intended to arrest them at the time of the stop. Both of these cases reject any attempt to assess the reasonableness of the officers' actions based on their subjective intent. Rather, these cases, like the Supreme Court cases discussed above, recognize that reasonableness under the Fourth Amendment depends on an objective view of all the facts and circumstances.

In the same vein are decisions from the Supreme Courts for Delaware, Colorado, and New Jersey, which have faced the issue even more squarely and have held, directly contrary to the Ninth Circuit, that an officer's express claim of greater authority to arrest does not negate the reasonableness under the Fourth Amendment of a valid investigative detention nor require probable cause instead of reasonable suspicion to support the detention. *Downs v. State*, 570 A.2d 1142, 1144 (Del. 1990); *People v. Stevens*, 183 Colo. 399, 517 P.2d 1336, 1339 (1973); *State v, Romeo*, 43 N.J. 188, 203 A.2d 23 (New Jersey 1964), *cert. denied* 379 U.S. 970, 85 S.Ct. 668, 13 L.Ed.2d 563 (1965). In *Downs*, the Delaware Court held that probable cause was not required to detain a passenger in a car which was properly stopped on reasonable suspicion because officers' statements implied he was under arrest and not free to leave. Said the *Downs* Court: "Words cannot transform a mere 'stop' into an 'arrest.' The focus is on what the police did rather than what they said." 570 A.2d at 1144.

Similarly, in *Stevens* the defendant was stopped and told she was under arrest after officers observed her enter a public restroom in which they found six bags of marijuana immediately after she left. During the questioning which followed, she admitted putting the bags there. In upholding the admission of defendant's confession against her claims that it was the fruit of an illegal arrest without probable cause, the Colorado Supreme Court said of the effort to characterize the

detention as an "arrest" which requires probable cause or a "stop" which requires something less,

> Attaching such significance to these labels ["arrest" and "stop"] is misplaced. These labels are merely a shorthand way of describing different degrees of intrusions on Fourth Amendment rights of privacy and should not be confused with the underlying analysis in deciding whether the particular intrusion was justified under the circumstances. * * * Therefore, we hold that labeling the detention as an arrest does not, *per se*, require that the arresting official have had probable cause to "arrest" with all the consequences that an arrest entails. The proper inquiry is whether the seizure was reasonable which turns on 'whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.' 517 P.2d at 1339.

Finally, in *Romeo*, a pre-*Terry* case, an agent serving a search warrant for evidence of illegal bookmaking requested the defendant's name and then arrested him, after which he observed the defendant try to dispose of incriminating gambling paraphernalia. Assuming that there was no probable cause to arrest the defendant at the time, the New Jersey Supreme Court held that the agent nonetheless had the right to be on the premises to serve the warrant, and so the putative arrest did not require suppression of the evidence observed in plain view. 203 A.2d at 31-32.

The Ninth Circuit's contrary analysis is in direct conflict with these Courts, as well as other decisions from intermediate appellate courts which reinforce the rulings in *Downs*, *Stevens*, and *Romeo*, and which demonstrate that the Ninth Circuit's opinion is contrary to the weight of authority. *See State v. Lyons*, 85 Wash.App. 268, 270-271, 932 P.2d 188 (1997) (rejected defendant's contention that officer's physically restraining him and telling him he was under arrest turned a proper investigative stop into an arrest for which probable cause was required); *State v. Sims*, 639 S.W.2d 105, 107-108, n.1 (Mo.App. 1982) (putative arrest, for which court assumed no probable cause, was not basis for search that yielded evidence; rather officer's reasonable suspicion justified

investigative stop of car and pat down search of defendant); *State v. Perera*, 412 So.2d 867, 871 (Fla.App. 1982) (investigative stop upon reasonable suspicion not changed to arrest requiring probable cause because some of the officers may have had the intent of arresting defendants prior to stopping them. "Actions taken by a law enforcement officer must be examined objectively as to how they affect a suspect and not from the standpoint of what the officer's intent was. [citations omitted]."); *State v. Walton*, 159 N.J.Super. 408, 388 A.2d 268, 271 (1978) ("Although officers in the instant case announced an arrest, they did nothing but detain defendant and his companion while attempting to ascertain what, if anything, they did," and so detention based on reasonable suspicion was proper, as was subsequent plain view of evidence that provided probable cause for arrest.).[6]

Thus in this case the question was not whether Officer McFadden announced or intended an arrest of the respondent, as the Ninth Circuit erroneously held, but whether his investigative detention was initially justified and was reasonably related in scope to the reasonable suspicion which justified it (*see Terry v. Ohio, supra* at 19-20). As we now discuss, below, the undisputed facts show that the respondent's investigative detention was justified by reasonable suspicion and was reasonably related in scope and duration to those suspicions. Accordingly, the officers acted reasonably under the Fourth Amendment, and petitioner is entitled to judgment as a matter of law. *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1994), *cert. denied*, __ U.S. __, 115 S.Ct. 2612, 132 L.Ed.2d 855 (1995); *See City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 1573, 89 L.Ed.2d 806 (1986) (no case "authorizes the award of damages against a municipal corporation based on the actions of one of its officers when . . . the officer inflicted no constitutional harm.").

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[6] Our research has disclosed one contrary state case, *Burkes v. State*, 830 S.W.2d 922 (Tex.Crim.App. 1991) (officer's admission that suspect was under arrest must be considered persuasive on that question).

III

Officer McFadden Had Grounds To Reasonably Suspect That The Driver And The Respondent May Have Committed Felonies Involving A Stolen Car, And Respondent's Detention Lasted Only Long Enough For Officer McFadden To Conduct A Diligent Investigation Which Was Reasonably Related In Scope To His Suspicions.

There is no issue about the propriety of Officer McFadden's initial stop of the car for speeding. Thereafter, he became aware of ample and reasonable grounds to suspect that one or both of the plaintiffs were involved in felonies involving a stolen car: a stolen car report, no vehicle registration, and a vehicle title in someone else's name. Those facts alone reasonably justified the brief investigation which followed to enable Officer McFadden to confirm or dispel his suspicions. *U.S. v. Miller*, 84 F.3d 1244, 1250-1251 (C.A.10 1996); *United States v. Fernandez*, 18 F.3d 874, 879 (10th Cir.1994) ("[a] defendant's lack of a valid registration, license, bill of sale, or some other indicia of proof to lawfully operate and possess the vehicle in question [gives] rise to objectively reasonable suspicion that the vehicle may be stolen."). Officer McFadden also reasonably relied on the report from the Medford Police that the car in which the respondent was a passenger had been stolen. *United States v. Hensley, supra*, 469 U.S. at 231-233; *United States v. Robinson,* 536 F.2d 1298, 1299-1300 (9th Cir. 1976).

As even the Ninth Circuit seemed to concede, the officers' actions here were within the scope of a *Terry* stop. (137 F.3d at 1144; App. A at page 5a). As a matter of course, they could order both the driver and his passenger from the car for questioning, *Maryland v. Wilson*, __ U.S. __, 117 S.Ct. 882, 885-886, 137 L.Ed.2d 41 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S. Ct. 330, 54 L.Ed.2d 331 (1977) and could put them in a squad car for questioning. *U.S. v. Miller, supra*; *see also United States v. Parr*, 843 F.2d 1228, 1231 (9th Cir. 1988) (placing defendant in patrol car did not constitute an arrest). They also could handcuff the detainees during this investigative detention as a precautionary measure under the circumstances the officers then faced.

> "[P]olice conducting on-the-scene investigations involving potentially dangerous suspects may take precautionary measures if they are reasonably necessary. . . . A brief but complete restriction of liberty, if not excessive under the circumstances, is permissible during a *Terry* stop and does not necessarily convert the stop into an arrest." *United States v. Bautista*, 684 F.2d 1286, 1291 (9th Cir., 1982), *cert. den.* 459 U.S. 1211, 103 S.Ct. 1206, 75 L.Ed.2d 447 (1983).

In that moment, the officers were faced with exactly the type of unpredictability and potential for violence which the Constitution does not require street officers to ignore. *See, e.g., Maryland v. Wilson, supra*, 117 S.Ct. at 886 (the possibility of a violent encounter stems not from the reaction of an ordinary motorist stopped for a traffic offense, but from the possibility that evidence of a more serious crime might be discovered during the stop).[7] Here, evidence was emerging that one or both of the car's occupants may be involved in the theft of the car they were driving, and the officers already had observed a machete and several bowie knives in the back seat. Thus, it was reasonable to further restrain the suspects, at least until the officers determined whether their suspicions were valid. The respondent was handcuffed in front, not back (App. B at page 13a), and it lasted only five or six minutes, just long enough for the officers' reasonable suspicions to be dispelled. This was neither unreasonable nor excessive under the circumstances.[8]

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[7] In *Pennsylvania v. Mimms*, *supra*, this Court recognized the "inordinate risk" facing an officer who approaches a car during a traffic stop. The Court cited statistical studies which indicated that some 30 percent of shootings of police occurred during such situations. 434 U.S. at 110, 98 S. Ct. at 333. Similarly, in *Maryland v. Wilson*, *supra*, the Court noted there were 5,762 officer assaults and 11 officers killed in 1994 during traffic pursuits and stops. 117 S.Ct. at 885.

[8] We expect respondent to argue that there were other, less intrusive ways to ensure the officers' safety, but the officers are not required to use the least intrusive method, and the only question is one of reasonableness. *See Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir.1994), *cert. denied*, — U.S. ----, 115 S.Ct. 2612, 132 L.Ed.2d 855 (1995). Similarly, we expect

The scope and duration of the officers' investigation also was consistent with *Terry*. There is no absolute time limit or requirement for a *Terry* stop. Rather, the detention must be temporary and no longer than reasonably necessary for the investigation, and the investigation must be diligent and likely to confirm or dispel their suspicions quickly. *United States v. Sharpe,* 470 U.S. 675, 686, 105 S.Ct. 1568, 1575, 84 L.Ed.2d 605 (1985); *United States v. Bautista*, *supra* at 1291. Officer McFadden and the other officers met those requirements. Their suspicion was cleared up in some five or six minutes, during which time Officer McFadden retrieved the Bill of Sale as requested by respondent's son and then requested further inquiry and confirmation from the Medford Police, immediately after which respondent and her son were told they could leave. It was reasonable and diligent to communicate with others in order to confirm the detainee's explanation. *United States v. Richards*, 500 F.2d 1025 (9th Cir. 1974) (approving detention during telephone calls to determine if plane was stolen); *see also United States v. Watts*, 7 F.3d 122 (8th Cir. 1993) (approving detention while radio check made of registration of suspect's guns to determine if stolen); *Harris v. United States*, 382 A.2d 1016 (D.C. App., 1978) (approving detention while police looked at nearby

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respondent to argue that neither she nor her son gave the officers any reason to fear for her safety. But the reasonableness of the officer's actions does not depend on his subjective perception, *United States v. Robinson, supra,* 414 U.S. at 236 (the officer's subjective fear, or lack of fear, is irrelevant; the issue is whether the caution was objectively reasonable under all the facts and circumstances), nor does it depend on one circumstance to the exclusion of others. *See Michigan v. Summers*, 452 U.S. 692, 702-703, 101 S.Ct. 2587, 2594, 69 L.Ed.2d 340 (1981) (although no evidence of special danger to the police, the inherent dangers of serving a search warrant for narcotics [which the *Maryland v. Wilson* Court found analogous to the inherent dangers of a traffic stop, 117 S.Ct. at 886] justified the officers temporarily restraining individuals at the scene to minimize risks to the officers and the occupants). The fact that the car's occupants in this case may not have added to the existing grounds for precautionary measures (i.e. beyond carrying dangerous weapons in the back seat) does not mean that the measures were unreasonable under all of the circumstances then confronting the officers.

restaurant for owner of car in which detainee claimed to have arrived at scene). [9]

Under these circumstances, Officer McFadden's announced arrest was irrelevant. The detention did not depend upon the announced arrest. Respondent's brief investigative detention was proper under *Terry* and was separately justified by Officer McFadden's reasonable suspicion which arose before the putative arrest.

Accordingly, the Ninth Circuit erred when it concluded that the announced arrest converted this to a detention that could only be reasonable if founded upon probable cause. This Court should grant review of this case in order to correct that error and to clarify the proper legal standard to be applied where an officer makes a claim of greater authority in carrying out a proper investigative detention within the scope of *Terry v. Ohio, supra*. Finally, this Court should grant judgment for the petitioner on the grounds that the officers in this case acted reasonably in carrying out an investigative detention which was properly founded upon reasonable suspicion and was reasonably related in scope to the grounds for that suspicion.

IV

The Ninth Circuit Erred in Holding that There was No Probable Cause to Arrest Respondent.

Although petitioner contends that the officers in this case conducted a proper investigative stop based upon reasonable suspicion, the District Court's entry of judgment for petitioner and against respondent also is sustainable, in the alternative, on the grounds that there was probable cause to arrest the respondent.

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[9] Respondent argued in the Ninth Circuit that it would have been less intrusive if the police had investigated by seizing the car instead of the respondent. Apart from the fact that seizing the car in which she was riding would have caused the same practical restriction on her liberty, at least for the next five or six minutes, this Court has rejected any requirement that police use the least intrusive method of investigation available. *See United States v. Sharpe, supra,* 470 U.S. at 686-687, 105 S.Ct. at 1575-1576.

> "In dealing with probable cause, * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." [quoting] *Brinegar v. United States*, *supra*, 388 U.S. at page 175, 69 S.Ct. at page 1310. Probable cause exists where "the facts and circumstances within their [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. [citing] *Carroll v. United States*, 267 U.S. 132, 162, 45 S.Ct. 280, 288.

Draper v. United States, 358 U.S. 307, 313, 79 S.Ct. 329, 333, 3 L.Ed.2d 327 (1959).

Although it concluded there was probable cause to arrest the driver, the Ninth Circuit in this case apparently found that the respondent had no relationship to the driver other than that of "passenger" which would justify imputing the driver's presumptive awareness that the car was stolen to the passenger. (137 F.3d at 1144; App. A at page 7a). In this part of its majority opinion, the appellate panel made no mention of the obvious, that respondent/passenger was the driver's mother, although it did so identify her in the "Background" portion of the opinion. (137 F.3d at 1143; App. A at page 4a). The mother-son relationship makes it more probable that the respondent would have known if her son did not legitimately possess the car. Respondent was not merely a passenger without any other connections to the driver, and it was not outside of the realm of probabilities that respondent knew she was riding in a car without the consent of its owner. This would be a violation of Oregon law, ORS 164.135, which makes it a felony to ride in or otherwise use another's vehicle without the owner's consent.[10]

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[10] Although respondent was told she was under arrest for possession of a stolen car, a civil rights action based on an alleged wrongful arrest is defensible if there was probable cause to arrest respondent for any related

Thus the Ninth Circuit erred in reversing the District Court's judgment for petitioner on the grounds that there was no probable cause to arrest respondent because it assumed there was no relationship between respondent and the driver other than as mere passenger. This Court should grant review of this case in order to correct that error and to reverse the Ninth Circuit's opinion on the grounds that there was probable cause to arrest the respondent and therefore the officer acted reasonably and petitioner is entitled to judgment in this civil rights lawsuit. *Scott v. Henrich, supra*; *City of Los Angeles v. Heller, supra.*

CONCLUSION

The police officers in this case reasonably detained respondent under *Terry v. Ohio, supra,* because they reasonably suspected involvement with a stolen car and the detention was reasonably related in scope to the circumstances that justified the detention in the first place. The Ninth Circuit erred in holding that Officer McFadden's announced arrest of the respondent and the driver required probable cause to support the detention, because this otherwise proper investigative detention was not justified by the arrest, but by the already existing reasonable suspicion.

Moreover, the Ninth Circuit erred in holding that there was no probable cause to arrest respondent because that holding erroneously assumed that there was no relationship between the respondent and driver other than passenger and driver. The panel therefore ignored the reasonable inferences of familiarity and knowledge that flowed from the respondent's status as the driver's mother

For each of these reasons, and to resolve the conflict that the Ninth Circuit's opinion creates with the First and Tenth Circuit Courts of Appeal, and with the highest Courts of Maryland, New Jersey, and Colorado, Petitioner City of Roseburg, Oregon, prays that this Court grant this petition for certiorari; that this Court review and reverse that part of the Ninth Circuit's judgment in this case which reversed the District Court's entry of judgment for petitioner against

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crime. *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990).

respondent Marlyn L. Rhode; and that this Court order judgment reinstated for petitioner and against respondent.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MARCH 4, 1998

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARLYN L. ROHDE; MARK E. ROHDE,
Plaintiffs-Appellants,

v.

CITY OF ROSEBURG, an Oregon municipal corporation; TOMMY A. SORENSON,
Defendants-Appellees.

No. 94-35805
D.C. No. CV-92-06314-01-MRH
OPINION

Appeal from the United States District Court
For the District of Oregon
John P. Cooney, Magistrate Judge, Presiding

Argued and Submitted
September 9, 1997—Portland, Oregon

Filed March 4, 1998

Before: William C. Canby, Thomas G. Nelson, and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Canby; Partial Concurrence and Partial Dissent by Judge Kleinfeld

SUMMARY

Individual Rights/Civil Rights

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that a police report that a vehicle is stolen may provide probable cause to

arrest the driver, but is insufficient to support the arrest of a passenger.

Officer Tom McFadden of appellee City of Roseburg, Oregon's police department stopped appellant Mark Rohde for speeding. Mark's passenger was his mother, appellant Marlyn Rohde. Mark was unable to produce the vehicle's registration, and the certificate of title he presented did not bear his name or his mother's. A police dispatcher informed the officer that the vehicle had been reported stolen. McFadden and another officer arrested both the Rohdes.

The officers soon discovered that the vehicle was not stolen, although it had been reported as such by a car dealer before he sold it to Mr. Rohde. The dealer had not notified the police that the vehicle had been recovered after a salesman found it on the street.

The Rohdes sued the City for false arrest under 42 U.S.C. § 1983. The district court granted the City's motion for summary judgment, concluding that the stolen vehicle report and lack of registration or title in Mr. Rohde's name gave the police probable cause for the arrests. The Rohdes appealed.

[1] The detention of the Rohdes could not be characterized as a *Terry* stop rather than an arrest. Under *Terry*, an officer may always order the driver and passenger out of a vehicle during a traffic stop, and may even handcuff and move both if he reasonably fears for his safety. However, in this case the restraint of the Rohdes crossed the line from investigatory stop to arrest because both were told that they were under arrest. The arrest had to be justified by probable cause.

[2] To have probable cause to arrest the Rohdes, the officers needed to know reasonably trustworthy information sufficient to warrant a prudent person in believing that each had committed a crime. Courts look to the totality of the circum-

stances known to the officers at the time to determine whether probable cause existed.

[3] Officer McFadden knew that Mr. Rohde lacked proof of registration, lacked title to the vehicle in his name, and he knew that the vehicle had been reported stolen. Oregon makes it a felony to operate or ride in a vehicle without the consent of the owner. A stolen vehicle report alone furnishes a sufficient basis to arrest the driver.

[4] When a person operates an automobile, he is effectively in possession of the vehicle, and can reasonably be presumed aware of its ownership. It is unlikely that a thief would casually lend a stolen vehicle to others; it is probable that the driver of a stolen car is either the thief or is aware that the car has been stolen. If an officer has a police report indicating that the vehicle has been stolen, he has probable cause to believe that the driver has committed the crime of either stealing the car, or knowingly operating a stolen vehicle.

[5] However, the reasoning that allowed the arrest of Mr. Rohde did not extend to Mrs. Rohde. She was merely a passenger, and could not be presumed to be aware of its unexcused absence from its owner's possession. Absent some indication of a relationship more substantial than that of driver and passenger, the arresting officer cannot impute the driver's presumptive awareness of the vehicle's legal condition to the passenger. In this case, the officers did not know that the driver and the passenger had any other connection to one another, and they had no basis to conclude that Mrs. Rohde was aware that the vehicle had been stolen. They lacked probable cause to believe that she knew of the car's legal status, and thus lacked probable cause to arrest her.

Judge Kleinfeld concurred in part and dissented in part, writing that the officers lacked probable cause to arrest either of the Rohdes.

Appendix A

COUNSEL

Thad M. Guyer, Medford, Oregon, for the plaintiffs-appellants.

Robert E. Franz, Jr., Matt Farmer, Springfield, Oregon, for the defendant-appellee.

OPINION

CANBY, Circuit Judge:

This appeal from the dismissal of a 42 U.S.C. § 1983 action presents the question whether police improperly arrested both the driver of a vehicle and its passenger on the basis of a police report indicating that the vehicle had been stolen. We conclude that the officer had probable cause to arrest the driver of the vehicle but not the passenger.

BACKGROUND

When Roseburg, Oregon Police Officer Tom McFadden stopped Mark Rohde for speeding, Mr. Rohde was unable to produce proof of vehicle registration and instead presented a certificate of title. The name on the title, however, was neither that of Mr. Rohde nor that of his passenger and mother, Marlyn Rohde. Officer McFadden radioed his dispatcher, who informed him that Medford, Oregon police had listed the vehicle as stolen. Officer McFadden immediately informed Mr. Rohde that he was under arrest, handcuffed him, and placed him in the back of his patrol car. Roseburg Police Officer Anthony Dimare then arrived on the scene. Together, he and Officer McFadden asked Mrs. Rohde to step out of the car and placed her under arrest. They handcuffed her and placed her in Officer Dimare's patrol car.

Mr. Rohde protested his innocence to the officers, prompting them to investigate further. They contacted the Medford Police, who confirmed the stolen vehicle report but concluded "there was obviously a mistake somewhere down the line." They advised the Roseburg Police to release the Rohdes, which they did. The total time the Rohdes spent under arrest was no more than 5 or 6 minutes. Eventually, it was discovered that a car dealer had reported the vehicle stolen three days before he sold it to Mr. Rohde. In the interim, a salesman had seen the vehicle on the street and driven it back to the dealership, but the dealer never informed the Medford Police that it had been recovered.[1]

The Rohdes sued the City of Roseburg for false arrest under 42 U.S.C. § 1983. The District Court granted the City's motion for summary judgment, finding that the stolen vehicle report and lack of registration or title in Mr. Rohde's name gave the Roseburg Police probable cause for the arrest. The Rohdes appeal.

DISCUSSION

[1] As an initial matter, the detention of the Rohdes cannot be characterized as a *Terry* stop rather than an arrest. Under the rule of *Terry v. Ohio,* 392 U.S. 1 (1968), an officer may always order the driver and passenger out of a vehicle during a traffic stop, *see Maryland v. Wilson,* 117 S.Ct. 882 (1997), and may even handcuff and move both if he reasonably fears for his safety, *see Allen v. City of Los Angeles,* 66 F.3d 1052, 1056-57 (9th Cir. 1995). In this case, however, the restraint of the Rohdes necessarily crossed the line from investigatory stop to arrest because both were told that they were under arrest. The officers' actions therefore constituted an arrest,

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[1]The district court did not reach the question whether the arrests were effected pursuant to an official policy or custom of the City, which is now the sole remaining defendant. *See Monell v. Department of Social Services,* 436 U.S. 658, 694 (1978). We, too, do not address the issue.

which must be justified by probable cause. *United States v. Martin*, 509 F.2d 1211, 1213 (9th Cir. 1975).

[2] In order to have probable cause to arrest the Rohdes, the officers needed to "know reasonably trustworthy information sufficient to warrant a prudent person in believing" that each has committed a crime. *United States v. Butler*, 74 F.3d 916, 920 (9th Cir. 1996) (quoting *United States v. Del Vizo*, 918 F.2d 821, 825 (9th Cir. 1990)). We look to the totality of the circumstances known to the officers at the time to determine whether probable cause existed. *Id.* We review de novo the district court's determination that the officers had probable cause to arrest the Rohdes. *United States v. Wanless*, 882 F.2d 1459, 1465 n.12 (9th Cir. 1989).

[3] In this case, Officer McFadden knew that Mr. Rohde lacked proof of registration, lacked title to the vehicle in his own name, and he knew that the vehicle had been reported stolen. Like most jurisdictions, Oregon makes it a felony to operate or ride in a vehicle without the consent of the owner. Or. Rev. Stat. § 164.135. On the basis of similar statutes, we have held that a stolen vehicle report alone furnishes sufficient basis to arrest the driver. *Lipton v. United States*, 348 F.2d 591, 594 (9th Cir. 1965). Other courts have found that a stolen vehicle report justifies the arrest of the driver even if the report is later discovered to be erroneous. In *Patterson v. United States*, 301 A.2d 67 (D.C. 1973), the arresting officer also relied on a dispatcher's confirmation that the vehicle had been listed as stolen. The court found that despite the error in the listing, the officer "clearly had probable cause to believe a crime had been committed and that [the driver] was the person who had committed it." *Id.* at 69.

[4] We agree with the rulings of *Lipton* and *Patterson*. When a person operates an automobile, he is effectively in possession of the vehicle and can reasonably be presumed aware of its ownership. It is unlikely that a thief would casually lend a stolen vehicle to others; it is probable that the

driver of a stolen car is either the thief himself or is aware that the car has been stolen. If an officer has reliable information, such as a police report, indicating that the vehicle has been stolen, he thus has probable cause to believe that the driver has committed the crime of either stealing the car or knowingly operating a stolen vehicle. In this case, Mr. Rohde did not present any proof of ownership that would rebut the evidence that the vehicle had been stolen. Officer McFadden thus had probable cause to arrest Mr. Rohde.

[5] The reasoning that allows the arrest of Mr. Rohde, however, does not extend to Mrs. Rohde. She was merely a passenger in the vehicle, and cannot be presumed to be aware of its unexcused absence from its owner's possession. It is less than likely that a casual passenger would inquire into the ownership of a vehicle, or that the driver would divulge the fact that the vehicle had been stolen to such a passenger. Absent some indication of a relationship more substantial than that of driver and passenger, the arresting officer cannot simply impute the driver's presumptive awareness of the vehicle's legal condition to the passenger. In this case, Officers McFadden and Dimare did not know that the driver and passenger had any other connection to one another, and they had no other basis to conclude that Mrs. Rohde was aware that the vehicle had been stolen. They lacked probable cause to believe that Mrs. Rohde knew of the car's legal status, and thus lacked probable cause to arrest her.

We affirm the grant of summary judgment to the City of Roseburg with regard to Mr. Rohde, we reverse with regard to Mrs. Rohde, and we remand to the district court for further consideration of Mrs. Rohde's § 1983 claim. The parties will bear their own costs on appeal.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Appendix A

KLEINFELD, Circuit Judge, partially concurring and partially dissenting.

I concur in the majority opinion with respect to Marlyn L. Rohde, but respectfully dissent with respect to Mark E. Rohde.

The officer reasonably stopped Mr. Rohde for speeding, and reasonably stopped him in the *Terry* sense for possessing a stolen car. Whether he could arrest Mr. Rohde depended, we agree, on whether, looking to the totality of circumstances, reasonably trustworthy information would warrant a prudent person in believing that Mr. Rohde had stolen the car.

Before the arrest, but after the stop, here is what the officer knew:

1. the car was listed in police records as reported stolen;

2. Mr. Rohde had handed him the title to the vehicle when he had asked for the registration.

After the officer arrested Mr. Rohde, he talked to him, and Mr. Rohde insisted he had bought the car. He also told the officer that the bill of sale was in the glove compartment. The officer looked, and a standard Department of Motor Vehicles form bill of sale was there. It was signed by the salesman with Mr. Rohde's name at the top as the buyer. That observation led the officer to inquire further and release Mr. Rohde.

"Totality of the circumstances" is a two way street. Driving a stolen car may amount to probable cause that the driver is the thief, but the officer has to consider the "totality of the circumstances," not just the stolen car report. Once the officer was handed the title, the totality of circumstances included not only a reasonably trustworthy report that the car was stolen, but also a reasonably trustworthy document suggesting that it was not. Titles to cars are ordinarily not in the glove compart-

ment except perhaps during the interval before registrations are issued. Once handed the title, a prudent person would ask another question, such as "can you prove this is your car?" before arresting the driver.

Under Oregon law, when a person buys a car, the transferee is obligated to apply for registration and for title. Ore. Rev. Stat. §§ 803.092, 803.370. In the ordinary course, there would be a period of time when the buyer would not yet have the registration and title in his own name. Unlike *Lipton v. United States*, 348 F.2d 591 (9th Cir. 1965), the totality of circumstances in this case obviated suspicion instead of adding to it. In *Lipton*, the driver had no license, claimed to have bought the car from his aunt but became evasive when asked where she lived, and "broke and ran" for two blocks when allowed to walk around the car to get identification out of the glove compartment.

The officer could have gotten to the truth without turning the *Terry* stop into an arrest, as easily as he did within minutes after the arrest. And even though the arrest lasted only a few minutes, the difference matters. Almost all of us have been stopped by police while driving, and there is no social or vocational stigma on account of it. But there is a considerable disadvantage in saying that one has been arrested. Whether one is seeking elective office, marriage, or a job, that one has been arrested may be a considerable obstacle. Many people will naturally believe that with that much smoke, there must have been some fire. Arrest itself is likely to be very upsetting the first time.

The police officer should have given Mr. Rohde a chance to explain, before arresting him. I would reverse.

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON FILED JULY 8, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 92-6314-CO

MARLYN L. ROHDE, and MARK E. ROHDE,

Plaintiffs,

v.

CITY OF ROSEBURG, OREGON, an Oregon municipal Corporation, and TOMMY A. SORENSON, doing business as Oregon Auto Exchange,

Defendants.

* * *

ORDER

COONEY, Magistrate Judge:

This is a civil rights action brought under 42 U.S.C. § 1983 against defendants City of Roseburg and Tommy A. Sorenson. Plaintiffs allege that their rights to be free from unreasonable seizure under the Fourth Amendment of the United States Constitution were violated by defendant City of Roseburg's police officers during an arrest of the plaintiffs following a traffic stop. This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. Defendant City of Roseburg

moves for summary judgment (#16). Plaintiffs have filed a response and cross motion for summary judgment (#19). Based on the following, the court grants defendant City of Roseburg's motion.

I. FACTS

The following paragraphs paraphrase defendant City of Roseburg's and plaintiffs' concise statements of material facts.

On September 1, 1990, City of Roseburg Police Officer Tom McFadden stopped Plaintiff Mark Rohde to issue him a speeding ticket. (Defendant's Exhibit 2 at 1, McFadden Deposition at 7-8). Mr. Rohde's mother, Plaintiff Marlyn Rohde, was in the passenger seat of the car. (McFadden Deposition at 11).

Officer McFadden obtained Mr. Rohde's driver's license. (Id. at 8). Mr. Rohde did not have a vehicle registration, and gave Officer McFadden the vehicle title in its place. (Id.). Officer McFadden noticed that the name on the title of the vehicle was different from Mr. Rohde's name. (Id. at 11). He observed several knives lying on the back seat of the car. (Id. at 20).

During the encounter, the dispatcher advised Officer McFadden that, according to the Medford Police Department, the car was a "signed stolen vehicle". (Id. at 8). This meant that the person who reported the car stolen signed the back of the report stating that they would take responsibility for towing charges, verifying that the information in the report was accurate and that the car was in fact stolen. (Id. at 9). The dispatcher received the information from a computer screen. (Id.).

After receiving this information, Officer McFadden immediately arrested Mr. Rohde. (Id. at 9-10). He placed Mr. Rohde in hand cuffs and put him in the back of the patrol car. (Id.). Officer McFadden informed Mr. Rohde that the vehicle was stolen and that he was under arrest for possession of a stolen vehicle. (Id.).

After placing Mr. Rohde in the patrol car, Officer McFadden and Officer Dimare approached Mrs. Rohde, had her step out of the vehicle, and placed her under arrest. (Id. at 13, Larner deposition at 9, Dimare deposition at 6). Officer McFadden informed Mrs. Rohde that she was being arrested for possession of a stolen vehicle. (McFadden deposition at 12-13). Officer McFadden hand-cuffed Mrs. Rohde with her hands in front of her, due to her age. (Id. at 13). Mrs. Rohde was placed in Officer Dimare's patrol car. (Larner deposition at 9, Dimare deposition at 7).

The basis for the plaintiffs' arrest was their presence in the car, the fact that the car was reported stolen, no vehicle registration, and Mr. Rohde's name was not on the title to the car. (Larner deposition at 15, McFadden deposition at 11-12, Dimare deposition at 9). It was standard police procedure for the City of Roseburg Police Department to arrest and hand-cuff anyone found in a stolen vehicle. (McFadden deposition at 13). Neither plaintiff presented any threat to the officers or suspicion of escape. (McFadden deposition at 22, Dimare deposition at 8). Officer McFadden advised Mr. Rohde of his Miranda rights and questioned him regarding the car. (McFadden deposition at 14). Mr. Rohde stated that he did not know the car was stolen and he had purchased it from Oregon Auto Exchange of Medford, Oregon, on May 22, 1990, in Medford. (Id. at 14). Mr. Rohde stated that there were papers in the car that showed

he purchased it. (Id.). Approximately two minutes after Mr. Rohde had been arrested, Officer McFadden obtained the bill of sale from the glove compartment. (Id. at 15). The bill of sale had Mr. Rohde's name on it and was signed by Ron Market, as salesman. (Special report at 2). "The bill of sale looked like an authentic DMV form." (Larner deposition at 11).

Due to the discrepancy in information Officer McFadden chose to further investigate and "settle it right out there in the field". (McFadden deposition at 16). He called Sergeant Larner, the on-duty watch commander. (Id. at 16-17). Sergeant Larner arrived on the scene and Officer McFadden explained the circumstances to him. (Id. at 17).

The officers on the scene decided to further investigate because "these folks were fairly well protesting that they were innocent . . .". (Larner deposition at 17-18). The officers then recontacted the dispatcher and requested that he contact the Medford Police Department to confirm the stolen car report, and explain that Mr. Rohde had a vehicle bill of sale. (Id.).

The dispatcher contacted Sergeant Stedman of the City of Medford Police Department. (Special report at 2). Sergeant Stedman confirmed the existence of a signed stolen report on the car. (Id.). Having heard the circumstances, Sergeant Stedman advised the City of Roseburg to release the plaintiffs, and to have Mr. Rohde contact him, because "there was obviously a mistake somewhere down the line." (McFadden Deposition at 18 — quoting Sergeant Stedman).

The plaintiffs were released from custody and were told to contact Sergeant Stedman. (McFadden deposition at 18). The plaintiffs were held in the patrol car for approximately five to

six minutes before they were released. (Id. at 17). The total time on the scene was approximately 25 minutes. (Dimare deposition at 6).

After the plaintiffs were released, Officer McFadden offered to escort them to the police station to contact Sergeant Stedman of the Medford Police. (McFadden deposition at 18). They accepted the invitation. Mr. Rohde contacted Sergeant Stedman, who advised Mr. Rohde that the car had been reported stolen three days prior to his purchase. (Special report at 3). A salesman had recovered the car from the street and failed to inform the police that it had been recovered. (Id.).

II. LEGAL STANDARDS

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a moving party is entitled to summary judgment as a matter of law "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact." *See Bhan v. NME Hosp's. Inc.*, 929 F.2d 1404, 1409 (9th Cir.) *cert. denied*, 112 S.Ct. 617 (1991). The moving party must carry the initial burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). The party meets this burden by identifying portions of the record on file which demonstrate the absence of any genuine issue of material fact. *Id.* In assessing whether a party has met their burden, the court must view the evidence and the inferences drawn from that evidence in the light most favorable to the nonmoving party. *Bell v. Cameron Meadows Land Co.*, 669 F.2d 1278, 1284 (9th Cir. 1982); *See also, Clemons v. Dougherty County*, 684 F.2d 1365, 1368-69 (11th Cir. 1982). All reasonable doubts must be resolved in the nonmovant's favor. *Clemons*, 684 F.2d at 1368-69.

If the moving party meets their burden, the burden shifts to the opposing party to present specific facts showing there is a genuine issue for trial. *See, Intel Corp. v. Hartford Acc. and Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991); *See also, Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986). The nonmoving party cannot rely solely on facts alleged in their pleadings to avoid summary judgement. *T.W. Elec. Service v. Pacific Elec. Contractors*, 809 F.2d 626, 630 (9th Cir. 1987). Instead, their response, by affidavits or as otherwise provided in Rule 56, must set forth specific facts showing there is a genuine issue for trial. *Id.*

III. DISCUSSION

Defendant City of Roseburg argues that the police officers on the scene had probable cause to detain the plaintiffs as a matter of law. Plaintiffs argue that the fact that they were driving or riding in a stolen car does not constitute probable cause to arrest them for possession of a stolen vehicle or unauthorized use of a vehicle.

ORS 133.310 authorizes police officers to make a warrantless arrest when they have probable cause to believe that the person has committed a felony. ORS 819.300 provides that a person commits the offense of possession of a stolen vehicle if the person possess a vehicle which the person knows or has reason to believe has been stolen. This offense is a class C felony. ORS 164.135 provides in part that a person commits the crime of unauthorized use of a motor vehicle if the person operates or rides in another's vehicle without consent. This is also a class C felony.

The Fourth Amendment protects against unreasonable searches and seizures. *United States v. Pena*, 920 F.2d 1509,

1514 (10th Cir. 1990), *cert. denied*, 501 U.S. 1207 (1991) (citation omitted). A traffic violation creates probable cause to stop the driver of the vehicle. *United States v. Barahona*, 990 F.2d 412 (8th Cir. 1993). When conducting a routine traffic stop, an officer may ask for a driver's license and vehicle registration, run a computer check, and issue a citation. *Id.* (citation omitted). If the driver produces a valid driver's license and proof of the right to operate the vehicle, the officer must allow him to continue on his way without delay or further questioning. *Id.*

Any resulting detention must be reasonably related in scope to the circumstances which justified the interference. *Barahona*, 990 F.2d at 416. Any questions must relate to the purpose of the stop. *Id.* If the responses of the detainee and the circumstances give rise to suspicions unrelated to the traffic stop, the officer may broaden his inquiry and satisfy his suspicions. *Id.*

Whether a warrantless arrest is constitutionally valid depends upon whether, at the moment of arrest, the officers had probable cause to make the arrest. *United States v. Martin*, 509 F.2d 1211, 1213 (9th Cir. 1975), *cert. denied*, 421 U.S. 967 (1975) (citation omitted). The defense of probable cause negates a § 1983 claim based on an alleged false arrest. *Howell v. Tanner*, 650 F.2d 610 (5th Cir. 1981), *reh. denied*, 659 F.2d 1079, *cert. denied*, 456 U.S. 918 (1982). Where the facts are not in dispute, the question of whether there was probable cause to arrest in one of law for the court. *See Linn v. Garcia*, 531 F.2d 855, 861 (8th Cir. 1976).

Once probable cause has been established, the legality of the arrest is not affected by a subsequent dismissal or acquittal of the charges. *Howell*, 650 F.2d at 615. The officer is not

required to conduct a trial before determining to make the arrest. *Linn*, 531 F.2d at 861.

Arresting officers have probable cause if, at the time of arrest, the facts and circumstances within their knowledge and of which they have reasonably trustworthy information, were sufficient to warrant a prudent man in believing that the arrested person had committed or was committing an offense. *Martin*, 509 F.2d at 1213. The court will consider all the facts known to the officers and consider all the inferences that could be drawn by them before arrest. *Id.* (citation omitted). A seizure of a person must be supported by probable cause particularized with respect to that person. *United States v. Prieto-Villa*, 910 F.2d 601, 604 (9th Cir. 1990).

The Fourth Amendment requires a standard of reasonableness, not certainty, and a sufficient probability is the touchstone of reasonableness. *Hill v. California*, 401 U.S. 797 (1971). Law enforcement officers must be allowed to rely on information relayed from officers and agencies in different localities in order to coordinate their investigations, pool information, and apprehend fleeing suspects. *United States v. Nafzger*, 974 F.2d 906, 910 (7th Cir. 1992). The officer who actually makes the arrest need not personally know all the facts and circumstances that constitute probable cause if they reasonably are acting at the direction of another officer or police agency. *United States v. Valencia*, 913 F.2d 378 (7th Cir. 1990). In that case, the arrest is proper so long as the collective knowledge of the agency is sufficient to constitute probable cause. *Id.* at 383.

In this case, Mr. Rohde was stopped for speeding. (McFadden deposition at 7). Officer McFadden had probable

cause to stop plaintiff's vehicle and ask him for his license and registration. *See United States v. Barahona*, 990 F.2d 412 (8th Cir. 1993). Officer McFadden asked Mr. Rohde for his driver's license and vehicle registration. (McFadden deposition at 8). Mr. Rohde had a driver's license, but he did not have a vehicle registration. (Id.).

Instead, he gave the officer the title to the car, which was under a different name. This made Officer McFadden suspicious. (McFadden deposition at 11). In addition, the dispatcher told Officer McFadden that the Medford Police Department reported the car stolen. (Id. at 9). Officer McFadden placed both plaintiffs under arrest.

In *Lipton v. United States,* 348 F.2d 591, 594 (9th Cir. 1965), the court found that "upon learning via radio from his headquarters that the car was stolen, the officer had probable cause to arrest the suspect on the charge of driving a stolen vehicle." In *Re R.E.G.*, 602 A.2d 146 (1992), the court found that an officer had probable cause to arrest suspect based upon computer information which stated the car was stolen.

It appears that Officer McFadden had probable cause to arrest the plaintiffs for possession of a stolen vehicle and unauthorized use of a motor vehicle, based on the facts and circumstances within his knowledge at the time of the arrest. Officer McFadden's justification for the plaintiffs' arrest was their presence in the car, the fact that the car was reported stolen by the Medford Police Department, that Mr. Rohde did not have a vehicle registration, and Mr. Rohde's name was not on the title to the car. (Larner deposition at 15, McFadden deposition at 11-12, Dimare deposition at 9). Officer McFadden reasonably relied in part on the information from the Medford

Police Department, and from the dispatcher regarding the status of the car as stolen, in determining that there was probable cause to make the arrest. The fact that the plaintiffs were released after a short stay at the investigation scene does not affect the legality of the arrest, because Officer McFadden had probable cause to arrest plaintiffs. *See Howell v. Tanner*, 650 F.2d 610, 615 (5th Cir. 1981), *reh. denied*, 659 F.2d 1079, *cert. denied*, 456 U.S. 918 (1982).

IV. CONCLUSION

Based on the forgoing, defendant City of Roseburg' motion for summary judgment (#16) is granted, and plaintiffs' cross motion for summary judgment (#19) is denied.

DATED this 8th day of July, 1994.

s/ [illegible]
UNITED STATES MAGISTRATE JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case Number 92-6314-CO

MARLYN L. ROHDE, et al.,

Plaintiffs,

v.

CITY OF ROSEBURG, OREGON, et al.,

Defendants.

JUDGMENT

Based on the record,

IT IS ORDERED AND ADJUDGED that this action is dismissed.

DATED this 8th day of July, 1994.

DONALD M. CINNAMOND
CLERK, U.S. DISTRICT COURT

s/ Craig W. Meyer
by Craig W. Meyer, Deputy Clerk

APPENDIX C — EXCERPTS OF THE DEPOSITION OF TOM McFADDEN DATED APRIL 27, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CIVIL CASE NO. 92-6314-TC

MARLYN L. ROHDE, and MARK E. ROHDE,

Plaintiffs,

vs .

CITY OF ROSEBURG, OREGON, an Oregon municipal corporation, and TOMMY A. SORENSEN, doing business as Oregon Auto Exchange,

Defendants.

DEPOSITION OF TOM McFADDEN

BE IT REMEMBERED THAT, pursuant to Notice, the deposition of TOM McFADDEN was taken on behalf of the Plaintiffs, as a discovery witness, before Linda D. Crago, Certified Shorthand Reporter, on Tuesday, April 27th, 1993, beginning at the hour of 2:07 o'clock p.m., at the Douglas County Courthouse, Conference Room 216, in the City of Roseburg, County of Douglas, State of Oregon.

[1] (WHEREUPON, Exhibit Number 1 was marked for the purpose of identification.)

TOM McFADDEN, called as a discovery witness on behalf of the Plaintiffs, being first duly sworn to testify the truth, the

Appendix C

whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GUYER:

Q. Officer, would you state your full name, please?

A. Tom McFadden.

Q. And do you live in Douglas County?

A. Yes, I do.

Q. And your age?

A. My age?

Q. Yes.

A. Thirty-seven.

Q. And how long have you lived in Douglas County?

A. Let's see, about nine years.

Q. And how long in Oregon?

A. Basically all my life, since second grade.

* * *

[20] stolen vehicle?

A. According to the information I gathered, Sergeant Stedman had called the car lot that they had purchased the car from, and they in turn told Sergeant Stedman that they had recovered the stolen car and failed to tell Medford.

Q. Did Mr. Rohde have any weapons?

A. He had several knives in the vehicle.

Q. And where were the knives?

A. They were lying in the back behind the driver and passenger seats.

Q. On the seats?

A. I believe they were laying on the seats in the back, yes.

Q. And what kind of knives were they?

A. As I recall, they were machetes, there was a machete, and several like bowie knives, and just a variety of different types of knives.

Q. And do you know what those knives were for?

A. I don't know.

Q. Did you discuss the knives with Mr. Rohde?

Appendix C

A. No, I did not.

Q. With respect to Mrs. Rohde, why didn't you just put her in the patrol car without handcuffing her?

A. Because we were investigating a felony, and all felonies that are under arrest that we are going to

* * *